UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE, individually and on behalf of all others similarly situated,

Plaintiff,

v. 22 Civ. 10019 (JSR)

JPMORGAN CHASE BANK, N.A.,

Defendant/Third-Party Plaintiff.

GOVERNMENT OF THE UNITED STATES VIRGIN ISLANDS,

Plaintiff,

v. 22 Civ. 10904 (JSR)

JPMORGAN CHASE, N.A.,

Defendant/Third-Party Plaintiff.

JPMORGAN CHASE, N.A.,

Third-Party Plaintiff,

v.

JAMES EDWARD STALEY,

Third-Party Defendant.

New York, N.Y.

Argument

May 19, 2022
3:00 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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(Case called)

THE DEPUTY CLERK: Will everyone please be seated and will the parties please identify themselves for the record.

MS. MARIELLA: Good afternoon. Sabina Mariella, from Boies Schiller Flexner, on behalf of Jane Doe.

MR. WOHLGEMUTH: Good afternoon, your Honor. Steve Wohlgemuth, from Williams & Connolly, on behalf of third-party defendant, Mr. Staley; and I am joined by Mr. Warren and Mr. Schiffmann of Williams & Connolly, as well.

MR. GAIL: Good day, your Honor. Lenny Gail, G-A-I-L, and Matt Collette, of Massey & Gail, on behalf of defendant JPMorgan.

MS. ELLSWORTH: Good afternoon, your Honor. Felicia Ellsworth, Boyd Johnson, and Hillary Chutter-Ames, from Wilmer Hale, on behalf of JPMorgan Chase.

THE COURT: Good afternoon, everyone.

I am ready to hear argument on Mr. Staley's motion to dismiss.

MR. WOHLGEMUTH: Thank you, your Honor.

THE COURT: I should mention for the record that each side has been given 20 minutes to make their initial presentation and ten minutes for rebuttal.

MR. WOHLGEMUTH: Thank you, your Honor.

I recognize that the Court is familiar with the allegations against Mr. Staley and obviously has devoted a lot

of time and attention to this case, which we appreciate, so I will just jump right in with what I view as the first major issue presented by our motion, which is JPMorgan's attempt to use contribution and indemnity claims to apportion liability under the TVPA. These claims --

THE COURT: I wasn't clear from the papers——maybe I missed it——is there a contribution claim with respect to the negligence claims as opposed to the federal claims?

MR. WOHLGEMUTH: I believe that JPMorgan, with respect to the Doe complaint, is alleging a contribution claim that covers -- tries to cover both the negligence claims and the federal claims under the TVPA.

THE COURT: So let's assume for the sake of argument that you are right about the federal claims. There would still be, would there not, contribution claims against your client with respect to the negligence claims.

MR. WOHLGEMUTH: Not with respect to the USVI complaint, where the only claims remaining are the TVPA claims. With respect to Doe, we believe that the negligence claims or the negligence-based contribution claims are meritless for other reasons.

And also, your Honor, this gets to the shotgun pleading point that we raised in our complaint. The way that these claims were pled, where they sort of mush all of these theories of liability together, precludes us from being able

to attack each one in a motions to dismiss. You can't plead a claim like that under Rule 8, under Rule 10(b). That's what they have tried to do. We think that that is a basis, an independent basis for dismissing the claim.

THE COURT: Well, I saw that in your papers, but I just want to be sure I understand. I think you raise a significant issue with respect to the federal claim, and I want to hear from both sides on that.

But other than your argument that the claims are too mushed together——a well-known legal principle——what is your basis, if any, for saying that you have a dismissal motion with respect to the contribution claims, the state claims?

MR. WOHLGEMUTH: With respect to the -- if I understand your Honor's question, it is directed toward the negligence claims alleged by Doe, for which JPMorgan is seeking contribution. My answer to that is that there are two problems with those claims.

Under New York State law, they have to allege——"they" being JPMorgan——that either a duty to the plaintiffs or to JPMorgan was breached. They haven't done that here.

And with respect to the other element of a contribution claim, they have to identify what the harm is that Mr. Staley allegedly caused and show that it's the same or plead that it's the same as the harm --

THE COURT: Okay. So those are independent arguments,

but now I understand what your position is. Okay.

So let's go to the federal claim you were starting to talk to me about.

MR. WOHLGEMUTH: Absolutely. In our view, these claims are clearly meritless and should have -- well, they are foreclosed by binding Second Circuit precedent. After we received JPMorgan's opposition brief, we see the basis for this claim is a New York State law contribution statute which JPMorgan is trying to use to divvy up liability under a federal --

THE COURT: You are saying that, among other things, in this Circuit that's foreclosed by the *Madoff* decision, where the Second Circuit, in a moment of weakness, affirmed my decision. So I am going to ask them, of course, how they distinguish that case.

But was there anything else -- it is clear that that is a significant argument, the clear holding of that case, if it is applicable here. Is there anything further that you wanted to say on contribution?

MR. WOHLGEMUTH: Just briefly, touching on some of their cases——the *NYSEG* case, the *Jackson* case, the *Too* case.

Two of those cases——*NYSEG* and *Jackson*——predate *Madoff*, so don't have the benefit of that clear pronouncement of the Second Circuit with respect to using contribution claims just as JPMorgan is trying to do here. And with respect to the

Jackson case, that actually supports our view. I believe that case is post-*Madoff*. That case holds that there can be no contribution claim for a federal copyright liability. That's exactly --

THE COURT: So what about *O'Melveny & Myers v. FDIC*, a decision by another prominent court, namely, the Supreme Court of the United States, which says, "Matters left unaddressed by a federal statutory scheme are presumably left subject to the disposition provided by state law." What about that? I'm not sure. If the *Madoff* case governs, I would not have the power to say it's contrary to that federal case, but it might be an issue for the Second Circuit. But what about that on the merits?

MR. WOHLGEMUTH: I think my answer to that is that the *Madoff* case does govern. The *Madoff* case, I think it's fair to say, is motivated by preemption principles, but it creates a bright-line rule that you cannot use state law contribution statutes to apportion federal liability no matter what the source of the federal liability is.

I think the *NYSEG* case actually demonstrates this tension pretty well, which is the case that JPMorgan tries to rely on. According to *NYSEG*, operating in a pre-*Madoff* world, it looked at the federal/state statute and it said, yeah, it is silent as to whether or not it can apply to federal statutes. The Court noted that there was a group of mostly

Southern District of New York cases that found that there was a categorical rule that the state law contribution statute cannot ever apply to federal statutory liability. It rejected those cases and then did a sort of first-principles analysis along the lines that your Honor is alluding to with the *O'Melveny* reference. But the Second Circuit in *Madoff* adopted that categorical rule and, in fact, cited many of the cases that the *NYSEG* case sort of shrugged off in 2007.

I do want to address very briefly the *A.B.* case, which is a case from the Eastern District of Pennsylvania. I think that is plainly distinguishable for a couple of reasons. The first and most important is that it is not from this circuit. The Second Circuit's case --

THE COURT: No, but it's from Philadelphia, which is my hometown, so I have to give it a lot of close study, anyway.

Go ahead.

MR. WOHLGEMUTH: That notwithstanding, the Second Circuit's decision in *Madoff* was not binding precedent for that Court, and the mechanics of the *Madoff* decision are very clear as applied to any federal liability.

I don't read the bank to be pursuing any implied claim of contribution under the TVPA or any implied claim of indemnity under the TVPA anymore, as I understand their opposition. But just for good order, that is also foreclosed.

The TVPA is completely silent as to indemnity and contribution. The legislative history is completely silent as to contribution and indemnity. The remedial scheme, as several circuit courts have held, is comprehensive. And, if anything, implying contribution claims and indemnity claims where none exist is contrary to the purposes of the statute because it takes control away from victims of human trafficking over their litigation and only increases the complexity of the cases that they have to litigate.

So I think that handles the federal law issues from our perspective, unless the Court has any questions.

I do want to turn to the other defects of what I will call the contingent or derivative claims, first being indemnification.

I think it is worth pointing out at the outset the oddity of these claims, implied indemnity claims, where a defendant is being sued and it says, though I'm being sued and may in fact be liable, every single penny of a judgment has to be paid by a third party. Given the oddity of that claim, it's not surprising that it applies in only very limited circumstances, and there are three prongs I want to highlight for the Court.

The first is, essentially what an indemnity claim is, it's an implied contract claim. And so when courts see that the parties have already thought about indemnification and

there is a contract governing indemnification and the right only flows one way but not the other, that precludes the Court from implying a right going the anti-contractual way.

THE COURT: So if I understand their argument——and I, again, want to hear from them on this——they are saying that even though it is a contract and it only flowed one way, not in the way they are now claiming, that that portion of the contract is void or defective, and therefore you are back to square one of no contracts, so to speak.

What about that argument?

MR. WOHLGEMUTH: So that is what they say and our response is that it doesn't matter. What matters is not -- I'm not claiming, I'm not arguing right now, I may later, but I'm not arguing that Mr. Staley is in fact entitled to be indemnified. All that matters for this analysis is that there is an indemnification right, it exists, it was bargained for, and that precludes implying something that goes the other way.

And if you look at the state law cases that we cite——the *Serv. Sign* case, the *Lamela* case, the *Honeywell* case——none of them involve grappling with whether or not the indemnification provision at issue in that case, the contractual one, not the implied one, actually applied on the facts. All that matters is its existence.

The second and third defects that we point out in our brief with respect to the indemnification claim I think

can really be analyzed together. They are two sides of the same coin. Indemnification claims are only cognizable when the third-party plaintiff is solely liable because of the third-party defendant's conduct and where the wrongdoing is within the sole province of a matter delegated to the third-party defendant. Another way of saying that is that you have to be completely passive in order to take benefit of, again, this very odd claim, and that's just not the case here. The plaintiffs allege all sorts of things that JPMorgan did that Mr. Staley didn't do. Mr. Staley didn't have --

THE COURT: Yeah, but is that really a motion to dismiss issue? Because let's assume a jury found that JPMorgan's liability rests solely on Mr. Staley's conduct or failure to act or whatever. Wouldn't that, then, eliminate the argument you are now making?

MR. WOHLGEMUTH: A jury could not find that on the claims as JPMorgan itself has alleged them. JPMorgan recognizes in its complaint, third-party complaint——I will cite for the Court at least 40 and 61——that Mr. Staley or others at the bank other than Mr. Staley had authority to fire Mr. Epstein as a client of the bank. That means that there is someone else making a decision. Whether or not it's reliant on information supposedly provided by Mr. Staley is beside the point. What matters is that there is someone else doing something. They are not purely passive. They have to make

the decision: fire/don't fire. That takes them out of the realm of indemnification simply on the basis of the allegations that they make.

THE COURT: Okay.

MR. WOHLGEMUTH: With respect to the contribution claims, I alluded to these arguments a little earlier in the presentation. On breach, there are three ways they could satisfy the existence of a duty and the breach of that duty. They could allege a duty to either one of the plaintiffs. They don't do that and concede in their brief that they intentionally did not do that. So there is no allegation of breach of a duty to Doe or to the USVI.

Instead, they hang their hat on breach of a fiduciary duty to the bank. The fiduciary duty claim that they have set out sounds in fraud. I don't think there is any dispute about that. The bank recognizes that. That means that 9(b) applies. The Second Circuit, this Court, courts all over the country have said in 9(b) cases you have to plead them with particularity, you have to give the who, what, where, when, how, why of the fraud. It is just completely absent from their complaint.

THE COURT: Well, assuming for the sake of argument that's true, wouldn't that at most get you an opportunity for them to replead to see if they can supply those now that substantial discovery has occurred?

MR. WOHLGEMUTH: We do not believe so, your Honor. There are classes of plaintiffs who have the opportunity to conduct pre-suit discovery. The government often in enforcement action has that right. Bankruptcy trustees often have that right. JPMorgan in this case had that right. They had several months of discovery to look into Mr. Staley's e-mails, to subpoena other folks, and bring their best shot when they brought this claim in March. Just like courts are hard on those plaintiffs that get pre-suit discovery, like bankruptcy trustees and the government, I believe it should take an extra -- it should be hard on JPMorgan here, as well. These are details that are not hard to provide if they are in fact true. They have access to all the witnesses. All of the statements by Mr. Staley, this alleged vouching that occurred, would have happened to JP -- would have been made to JPMorgan employees.

THE COURT: My recollection is they did -- well, while being careful always to assert that they factually disagree with Jane Doe's allegations and the Virgin Islands's allegations, they did incorporate them by reference with respect to the claims that they were then making against your client. So doesn't that supply a lot of the particulars?

MR. WOHLGEMUTH: It doesn't supply the particularity. Well, first of all, I will push back against the premise a little bit, and then I will answer the question directly.

Pushing back against the premise, I don't think they——and expressly they do not——incorporate all of the allegations of the plaintiffs in their complaint, and they pick and choose which ones they want and which ones they like. And, as your Honor notes, I think the more important part is they disclaim the truth of those allegations.

But to answer the Court's question more directly, that doesn't matter because their theory of fraud, their theory of misrepresentation depends upon vouching that occurred inside the walls of JPMorgan. They are the ones who know the who, what, where, when, how. Who did he say it to? What did he say? They are the only ones who could supply that detail. The plaintiffs certainly don't because they are not within those four walls. That's on them, that's their burden, and they haven't even tried to meet it.

With respect to the harm point, again, this is just a clear pleading failure. In order for a contribution claim to be cognizable, a third-party plaintiff has to identify the harm, and it has to point out and allege that it's the same as the harm that it is alleged to have caused. They do not do that at all. The complaint is completely absent of allegations identifying the harm that Mr. Staley caused the USVI or Doe.

And I think, your Honor, that that was probably intentional because, for example, with respect to the USVI, I'm

not even sure what harm they could plead that Mr. Staley caused. As I understand the remaining claims by the USVI, all that is left is a claim under the TVPA where the USVI is proceeding as a regulator. It is a government enforcement action where they are seeking civil penalties. I don't know how Mr. Staley can be claimed to have caused harm to the USVI in that capacity.

So, again, we just have a clear pleading failure with respect to this claim.

THE COURT: I'm going to remind you that, regretfully I have to limit you to 20 minutes, as I have to limit your adversary, because I have a 4:00 matter.

MR. WOHLGEMUTH: Absolutely, your Honor. I will turn, then, briefly to the employment law claims which are independent of the contribution and indemnity claims.

Here, we think the indemnity claims and contribution claims have got to go for the reasons that I just --

THE COURT: Yeah, and if they go, then the other claims go, as well, right?

MR. WOHLGEMUTH: Correct. Rule 14 is the rule that governs third-party practice, and it says that only contingent claims that are derivative of or depend upon the plaintiffs' claims are properly pled. Now, once you have properly pled contingent claims, you can hang other claims on, I think, under Rule 18. But if the main derivative claims are gone, the other

two employment claims have to be dismissed, in our view.

But they are also defective on the merits. There is a huge statute of limitations problem with these claims. Mr. Staley left the bank, JPMorgan, over a decade ago. The claims and the conduct that is alleged and underlines their theories of liability occurred about almost 15 years ago in some cases. And New York law, as the Court knows, is --

THE COURT: You are saying that even if the discovery extension occurs, by the time they got around to firing him, they had to know much of what the plaintiffs are alleging or at least they were on notice of it.

MR. WOHLGEMUTH: Absolutely. By the time they got around to firing Mr. Epstein, they should have been on notice of a lot of what the plaintiffs allege. They had access to Mr. Staley's e-mails and could have been on notice of a lot of what the plaintiffs allege which, of course, is basically a large portion of the basis of the USVI's allegations against Mr. Staley relating solely to his e-mails which JPMorgan has had. And certainly by the time 2018 and 2019 roll around and there are articles about Mr. Staley -- sorry, about Mr. Epstein, sort of renewing the scrutiny and renewing the thought that he maybe was much worse than people had thought back in 2006 through 2013, they were on notice certainly by that point. And even with the two-year discovery rule, JPMorgan is out of time, and these claims are stale.

THE COURT: All right. I'm going to need to cut you off at this point, but thank you very much. We will hear now from your adversary.

MR. GAIL: Good afternoon, your Honor.

There is a lot to cover, partially because we have got a grab bag of allegations and then we have some stuff like *Madoff* that I really want to dig into with the Court. So let me try and cover both of those. Obviously, your Honor will drive the proceedings.

We well know all well-pleaded allegations are taken as true. The plaintiffs' well-pleaded allegations, which were incorporated and attached essentially by attaching the complaints to our third-party complaint, essentially allege Staley violated the TVPA, that he knew of Epstein's sex trafficking because he observed it, and Doe further alleges that he participated in his sex trafficking by, among other things, engaging in a violent sexual assault of Doe.

JPMorgan alleges that if the plaintiffs' allegations are true, then Staley caused some or all of the plaintiffs' claim because Staley vouched for Epstein within the bank which allowed Epstein to continue to access the funds plaintiffs contend was essential for his trafficking. All harm or injury that the plaintiffs allege flows from him being a JPMorgan client. So our position is, in the third-party claim, had he done what he was supposed to do, had he observed his

obligations, Epstein would not have been a client, and no harm or injury or a substantial amount of harm or injury would not have occurred.

So let's go through some of the grab bag arguments if we can.

First, contribution is clearly available, as the Court recognized, for Doe's negligence claims. There are two arguments why it wouldn't apply or make weight. Under the New York statutory law, the only question is whether the injury is shared, whether it is the same injury, which is clearly met here. JPMorgan and Staley are both subject to liability for damages from their alleged participation according to the plaintiffs from their banking Epstein.

The legal grounds by which JPMorgan and the third-party defendant Staley may be liable can be different under the statute. There is no question, though, that the injury is the same because we continued to bank him and therefore the contribution claim is appropriate.

I am going to skip over the TVPA for a quick second and go to these other ones and then spend the meat of the time on that.

Contribution is not an end-around for what the plaintiffs -- from the plaintiffs' complaint. Rule 14 makes clear the right of plaintiffs to control whom to sue is not implicated by third-party claims. As the Second Circuit held

in *Chemung Canal*, plaintiffs should not be indifferent to the presence of contribution claims because it should be indifferent because it doesn't affect their ability to recover the full amount of their damages.

The Court already decided that there are countervailing issues of judicial committee and prejudice to JPMorgan that warrant inclusion of Staley as a third-party defendant when you rejected their motion to sever. And Staley is staying in this case because, as the Court observed, we get contribution for Doe's negligence claims.

Let's talk about the indemnification bylaw for a second. Staley apparently contends that our corporate bylaws, which provide indemnification to the extent permitted by Delaware law, means he can never be sued for indemnification ever. That's the upshot of their argument.

That isn't a serious argument. No company ever provides indemnification to its officers and directors that can -- for all purposes and for all acts. Even if they committed criminal acts that caused liability to the company, that's the upshot of Staley's argument, and that's not right under Delaware law, and Delaware law incorporated in the bylaws put the contours of what they are calling a contract in place. That is 8 Del. Code 145(a).

That's why the JPMorgan bylaw isn't what they are calling a one-way indemnification. If the plaintiffs'

allegations are true, Staley acted in bad faith against the interests of the corporation, and he will be held liable for indemnification against JPMorgan under Delaware law.

Now, not surprising --

THE COURT: Just so I understand --

MR. GAIL: Sure.

THE COURT: -- this last argument, so you have a contract, in effect, between the employer and the employee, and the contract says with respect to indemnification if you do X, Y, or Z we will indemnify you, but nothing else, but is totally silent about the other direction. And you are saying that that silence doesn't mean that, as part of the contractual deal, the agreement was that there would be no indemnification going the other way?

MR. GAIL: No, your Honor. Let me be clearer, and two responses.

One, the bylaws just say we are going to indemnify to the fullest extent by Delaware law. That's all they say. And Delaware law has its own limits which, in this world of a contract -- and I'm going to come back to argue this is not really a contract within the meaning of the one-way indemnification cases. But even pretending it's a contract, the contract never contemplated he could never be sued for indemnification. Because Delaware law is incorporated, Delaware law absolutely prohibits indemnification for acts

that are considered in bad faith or violation of law. So it was never a part of the contract, therefore it is not a one-way.

Second, look at their cases closely. It won't take you long. Their cases deal with bilateral negotiated contracts from which the Court can infer a one-way relationship because nobody on the other side said, hey, I want indemnification going the other way. Those are actual bilateral negotiations. They provide you zero cases that talk about a generic bylaw indemnification, and that's why. It's what we just discussed.

THE COURT: Okay. Let's turn to what I am most anxious to hear you --

MR. GAIL: Okay.

THE COURT: -- talk about --

MR. GAIL: Let's get to the meat.

THE COURT: -- which is the *Madoff* case.

MR. GAIL: All right. Terrific.

The question at bar is whether the TVPA displaces and precludes contribution and indemnification claims that would otherwise be permissible. That inquiry with respect to the TVPA and other federal statutes does not begin and end by looking at the text. No case anywhere says so.

Whether evaluating using a full preemption rubric or a more truncated analysis, like in *Madoff*, the question is

always statute specific. Is indemnification and contribution consistent or inconsistent with the statutes, objectives, and legislative history? Does the federal statute sound in tort or in trust or in other state law? Is the statutory scheme so comprehensive that it supersedes under preemption rules and displaces state statutes, including contribution? Or, like here, does the statute leave room for negligence claims brought under common law or other remedies, like punitive damages, even though the statute is silent --

THE COURT: Well, let me see if I understand that argument completely. So in the *Madoff* case, the Second Circuit, hereinafter referred to as my esteemed bosses --

MR. GAIL: Boss.

THE COURT: Right.

-- says, "It is settled in this Circuit that there is no claim for contribution unless the operative federal statute provides one."

Now, there is nothing in the wording of the statute that we are concerned with that says anything about contribution, so your argument is, nevertheless, it implicitly provides one? Is that the argument?

MR. GAIL: I'm not sure I would use the word "implicitly." I think they were using shorthand, and let me explain, if I might.

Madoff rejected the New York contribution statute

under SIPA, and we will talk about it did not do that for all federal claims. Right? The language its quoting wasn't at bar. As your Honor put it in the case below, "New York's contribution statute didn't apply under SIPA. While the trustee is obligated to pay customer claims pursuant to a statutory scheme, he is not subject to liability for damages in the sense contemplated by the contribution law of the State of New York."

Madoff upstairs held that "the New York contribution statute requires some form of compulsion, that is, the party seeking contribution must have been compelled in some way, such as the entry of a judgment, to make a payment." But again, the Second Circuit says, "SIPA does not require customers to establish a basis of liability as a prerequisite for the trustee's disbursement." As such, these SIPA cases did not determine if 1401 could ever apply to federal law, much less a statute that sounds in tort like the TVPA.

So let me make a few more points about *Madoff*.

Second, *Madoff* recognized elsewhere in the opinion——I think it may even be the next paragraph, your Honor——that a contribution right could be found by implication. So did the Supreme Court in *Northwest Airlines*, which *Madoff* relies on and cites, and in *Texas Industries*. All of those cases recognized that implied rights of contribution for federal claims can be appropriate.

So the question is, is it appropriate here in the face of silence? All those cases, when they say "clearly implied" or "implied," they mean in the face of the silence that we are talking about. And that is what is appropriate here. The right of contribution furthers the TVPA's express purpose of punishing traffickers.

As we say, the legislative history has three objectives expressly stated in the house report——to compensate plaintiffs, to punish traffickers, and to do justice, essentially. And in this case, reading the right of contribution or not preempting New York's statute, where the legislature said we want to give contribution, is consistent with the notion of punishing traffickers.

Third, and the broader point that you alluded to when you were asking our friends on the other side, *Madoff* should be read in light of preemption principles. I think Mr. Wohlgemuth said honestly it was motivated by preemption principles, and he is right on that.

Your Honor's *Picard* opinion contained a preemption analysis, albeit a brief one. You wrote, "Given that these payments are being made pursuant to a comprehensive statutory scheme, the Court concludes the trustee cannot rely on state law." Here, the TVPA does not establish a comprehensive statutory scheme. One, it leaves room for negligence claims, as your Honor -- as we have discussed; and, second, courts

have implied a right to punitive damages which they would not if the remedial scheme at issue here were truly comprehensive. The *New York State Electric* case, from the Northern District, basically frames it as exactly the preemption point we are making.

So, in short, this case is about the TVPA, not SIPA, which we discussed, what you and the Second Circuit say doesn't invoke the contribution statute of the State of New York. TVPA is not a labor statute, like the FLSA and Equal Pay Act, as in *Northwest Airlines* and in *Herman*, where there is clearly preemption. Those are comprehensive. And it is not like the antitrust laws in *Texas Industries*, where there is a whole discussion specific to the antitrust laws, you know, how do you look attribution? Do you look at market share? Do you look at revenue? Do you look at culpability? None of those questions are present here. The jury will allocate responsibility on the V when you instruct them on contribution.

So the question at bar is whether the TVPA's silence should be read to displace state indemnification and contribution law. Here, a state statute that when you read it——and I'm sure your Honor has or will——that expressly contemplates contribution under federal statutes, because it exempts federal worker's compensation, which they wouldn't have put in if it didn't apply to federal statutes, we submit that individuals who have contributed to injuries for TVPA

violations should be held accountable with civil damages, and that purpose is implied by the TVPA itself and legislative history. Here is the exact quote from the House report is "to ensure punishment of traffickers." That's at page 2, H.R. Rep. 108-264(II).

The same approach, as I mentioned, to the statutory silence is reflected in the cases that have consistently found the propriety of punitive damages awards despite the TVPA's silence where, as here, the TVPA sounds in tort and state law permits those damages.

THE COURT: All right. So only because, again, I need to be mindful of the time, did you want to say anything about the 9(b) argument on the employment claims?

MR. GAIL: I can do that quickly.

I mean, as your Honor pointed out, we essentially incorporate the plaintiffs' complaints. There is a specific reference in one of them, just as an example, of a January '11 meeting, January 2011 meeting, after which they went to Staley, the JPMorgan people, and he vouched for Epstein and remained as a client. And we allege that that is part of the vouching for him that had JPMorgan continuing to keep him as a client.

We also have this fraudulent concealment position, where we specify, with specificity, that on his departure he signed -- affirmed his obedience to the code of conduct which he never could have signed if the plaintiffs' allegations are

true. He would have done a thousand things in violation of the code of conduct.

There is one point I wanted to make, oh, where Mr. Wohlgemuth seems to suggest, I mean suggests -- it is nowhere in the pleadings, it is nowhere outside the pleadings, that somehow Staley was fired because of Epstein? There is zero evidence -- there is zero allegations, which as you know, we are all about here, it's what the allegations are, and there is zero evidence of that.

In fact, the same thing with these newspaper articles and the subpoena that he alleges that are not in the complaints. We will have a debate, if he wants it, on statute of limitations on summary judgment, but on the four corners of the complaint, there is zero -- there is nothing that would have put us on inquiry notice, and we have gone further and alleged fraudulent concealment.

Let me make a few other points.

THE COURT: Do you want to give me a hint? I agree with you totally that I govern in this motion totally by the pleadings, but just out of curiosity, so why was he fired?

MR. GAIL: Well, I -- let's say that -- can I get away with telling you that it had absolutely nothing to do with Epstein?

THE COURT: Well, you can get away with it --

MR. GAIL: I mean, is it okay?

THE COURT: -- for today's purposes, anyway. Okay. It is --

MR. GAIL: If your Honor would like us --

THE COURT: It's not --

MR. GAIL: -- if that's --

THE COURT: I doubt that it's going to be a material issue in my decision in this motion, but curiosity got the better of me.

MR. GAIL: Fair enough.

I have a little more time where, unless there is anything else, I would like to go back to the meat of the TVPA --

THE COURT: Go ahead.

MR. GAIL: -- issue.

So consistent with that whole schtick I gave you earlier, courts have allowed --

THE COURT: Another legal term like "mush."

MR. GAIL: Yes.

Courts have allowed contribution for claims under federal statutes even when the statute is silent. *City of Los Angeles v. AECOM* had a state -- recognized a state law right to contribution for violations of the Americans with Disabilities Act, a federal statute. *A.B. v. Marriott* is your hometown case that is consistent with -- that says -- it's one of two cases, only one of which is not *in dicta*, that rules

that contribution, under state law, is appropriate under the TVPA.

And by the way, if you pause for a second, their position on indemnification, as I mentioned earlier, would mean that Marriott couldn't have joined the actual traffickers. Had their position on this one way indemnification been true in this case, we couldn't join Staley and we couldn't even join Epstein if Epstein were alive because, according to them, there is no right of contribution and no indemnification. That can't be the law, and it's not the law.

Other federal statutes for which there has been state contribution, the Lanham Act in *Too v. Kohl's* and, as I mentioned, the *New York State Electric & Gas Corporation*, which found a state right to contribution under CERCLA. States can also -- in addition to this, states have used federal law as a predicate for claims under state law whether for contribution or for a separate cause of action.

I mentioned the statute itself contemplates a federal hook for contribution, and the violation of federal statutes, as the Court undoubtedly knows, is often used as a predicate for negligence, which are state law claims, or state unfair competition claims. All of those are using a federal statute and allowing parties——in those cases mostly plaintiffs, but a third-party plaintiff is similar——to provide contribution or

other relief even when the statute is silent. And they are doing that because the federal statute does not fully preempt.

The only way for this Court to conclude that the contribution law enacted by the legislature of the State of New York, duly elected, does not apply is to conclude that the TVPA preempts it. Let me quote from the *New York State Electric & Gas* case. "*Herman* and *Northwest Airlines* are better understood in presenting questions of conflict preemption rather than standing for the proposition that the use of a state rule of contribution is never appropriate when the underlying liability arises under federal law."

THE COURT: All right. Thank you very much. I think we are ready to hear rebuttal.

MR. GAIL: Do I get my minute-ten on the other side.

THE COURT: We will see if we have got anything.

MR. GAIL: Okay. Thank you.

THE COURT: I'm sorry. My watch was different. So I will give you in your rebuttal 11 minutes and 10 seconds.

MR. GAIL: Thank you, your Honor.

THE COURT: And you could take that time, too, if you want.

MR. WOHLGEMUTH: Thank you, your Honor.

A couple of points to respond to Mr. Gail's presentation.

I will probably start with the *Madoff* case and that

federal issue. I didn't hear from Mr. Gail an identification of a single case decided after *Madoff* that proceeds in an analysis that looks anything like what the bank is arguing, not one. *New York State Electric & Gas*, or *NYSEG*, as I referred to it, is pre-*Madoff*. It focused on cases that it said adopted a categorical rule and rejected those cases, and *Madoff* then adopted the categorical rule. He is citing old law that has been abrogated by *Madoff*. And this argument, frankly, it requires the Court -- their argument requires them to say to the Court the Second Circuit did not mean what it said in *Madoff*, and the language that you read very clearly spoke of any federal liability.

The same is true for the *Herman* case, which was even decided before *Madoff*, where they say, "Federal courts recognize a right to contribution under state law only in cases in which state law supplies the appropriate rule of decision." that ends the matter. There is no need to talk about the *NYSEG* case or any other case. The Second Circuit has spoken very clearly.

And even with respect to the *Too* case, which I heard come up and was surprised to hear come up, frankly, in the Southern District of New York that case has received unfavorable treatment, where other courts in the Southern District have said the parties didn't even brief the issue that we are talking about here today and in fact that case was

against the weight of the well-reasoned decisions coming the other way.

THE COURT: So if you are right, I don't have to reach the issue about preemption. But to make sure we cover everything, what about the argument that this is not a preemptive statute? There was a criminal statute, they tacked on a civil right of action to accompany it. It doesn't have the feel, if you will, of a preemption statute, such as the ones they cite. What about that?

MR. WOHLGEMUTH: The Ninth Circuit and the Sixth Circuit have both called the TVPA comprehensive in scope. And, again, the implied right of contribution analysis is fairly straightforward. Look at the text. It's not there. Look at the legislative history. All I heard from Mr. Gail was a generic statement of something like we don't like traffickers? I don't see how you read a contribution claim given that statement. And, three, I would disagree and push back strongly against the idea that a contribution claim is what Congress intended. I think it is very disruptive to plaintiffs, who are choosing who to sue in a trafficking case, to have defendants decide who in fact they have to sue. That's not what Congress intended, and in fact Congress has amended the TVPA and they have not added a contribution claim, and they know how to do that if they want to.

A couple of points on the state law claims.

THE COURT: I'm not sure I fully understand what you just said. If you are right in your reading in the scope of *Madoff*, we know you can reach this issue. But I thought you were making the additional argument or alternative argument that this is a preemptive statute or should be read at preempting the field, and therefore state contribution law is irrelevant because Congress did the whole thing. I'm not clear why you say it is that, when a typical preemptive statute will, frankly, go on for pages, with lots of accompanying regulations and so forth, and this doesn't seem like one of those.

MR. WOHLGEMUTH: Your Honor, we believe it is a comprehensive remedial scheme. Other courts have called it a comprehensive remedial scheme. But even just backing up, how can they imply a cause of action? How can they have a cause of action for contribution relating to liability --

THE COURT: No, I think their argument, at least in part——again, there are many arguments before me from both sides——is that if the federal statute is silent and if *Madoff* doesn't apply, that then you look to whether it is, for lack of a better way to put it, a classic tort to which the state laws, including the state laws of contribution, should be relevant. I think that's sort of one of their arguments.

MR. WOHLGEMUTH: So in a world in which *Madoff* does not exist, I still think we are correct, but we are in a world

where *Madoff* does exist.

THE COURT: There is no doubt that's your strongest argument. I just wanted to make sure I understood your fallback argument.

MR. WOHLGEMUTH: Correct. Yes. Our argument, our fallback argument is that there is a comprehensive scheme and that it would not be appropriate to use state law to graft on a remedy that Congress expressly has chosen not to provide.

I do want to clarify one thing. I think I may have misunderstood your Honor's argument -- or your Honor's statement about JPMorgan would have been on notice by the time they fired him. I thought "him" was referring to Mr. Epstein, not Mr. Staley. I didn't mean to imply in any sense that Mr. Staley was fired because -- or even that he was fired for any reason relating to Mr. Epstein.

On the contribution point, I heard Mr. Gail address the same injury point, but what I did not hear was a reference to any paragraph number in his complaint in which they allege what the injury was that Mr. Staley caused. It's just not there, it wasn't in the presentation, and it's a clear pleading failure.

On the indemnification point, Mr. Gail makes a lot of the fact that the bylaws state the bank will indemnify officers and directors to the fullest extent of the law. Well, that's all any indemnity obligation can provide. No state, at least

that I'm aware of, allows indemnification for any liability such as fraud. There is all kinds of carveouts always. But the New York courts don't do this dance that Mr. Gail would have the Court do of figuring out whether or not the indemnification clause actually covers the conduct or not. They just say is it there? Yes or no? Up or down? It's there. We are not going to imply one going the other way.

And contrary to Mr. Gail's point, bylaws are in fact contractual in nature. The Delaware Court of Chancery has held that. I believe there are cases in the Southern District of New York that have also held that. They are contractual arrangements --

THE COURT: The argument, again, as I understand it, is, okay, we agreed by contract to indemnify you to the extent Delaware law permits. The argument is that doesn't mean that we were contractually giving up our right to sue you for indemnification if Delaware law otherwise permitted us to sue you for indemnification. That's, I think, the argument they are making.

MR. WOHLGEMUTH: Well, that is an analysis that I am not familiar with under any of the cases. I don't think it is supported. The cases look at is there a right? Does it exist? If it does, we are not going to apply one going the other way. That's the end of the matter. It's actually a fairly simple --

THE COURT: Again, I don't mean to be putting words in your adversary's mouth, but at least as I understood his argument, he says the cases that say that are where the whole thing was negotiated as opposed to simply an, if you will, almost boilerplate inclusion of to the extent Delaware law says we have to indemnify you, we agree we have to indemnify you.

MR. WOHLGEMUTH: What matters not is whether it is negotiated. What matters is whether one side is promising the other we will indemnify you to the fullest extent permitted by law. And what has happened is the bank is promising its directors and officers that it will indemnify them to the fullest extent of the law, and it is doing nothing to extract a promise going the other way. It just hasn't happened. It's not in the complaint. It's not in the record.

Last point on the Rule 9(b), again, I heard Mr. Gail refer to the plaintiffs' complaint about the fact that there had maybe been vouching after one meeting, well, what does the bank say? Was there vouching? What did Mr. Staley actually say? The plaintiffs——both Doe and the USVI——were not there at the meeting in 2011 at JPMorgan Chase's offices. Mr. Gail's clients were. So what did Mr. Staley say, who did he say it to, and why did they rely on it? That is what Rule 9(b) provides or requires, it's very straightforward, and it's just completely absent from their complaint.

THE COURT: The problem I am having with that

argument, as you may have gathered from my question to you previously, is typically a 9(b) failure in the pleadings gives rise, at most, to an opportunity to replead. You are saying, well, they had all this time before they even sued us and, you know, eh. But my recollection is that federal law is clear that the opportunity to replead should be liberally granted.

MR. WOHLGEMUTH: The first response is we do believe it should be dismissed with prejudice. They had every opportunity to make this allegation and they didn't. But even if this Court did allow them to replead, they still have to make the allegation.

THE COURT: Okay.

MR. WOHLGEMUTH: They have to say what's true and what's not.

THE COURT: So you know what you are facing is what you are saying.

MR. WOHLGEMUTH: Yes.

THE COURT: I think you have reached the end of your time, and let me hear from your adversary.

MR. WOHLGEMUTH: Thank you, your Honor.

THE COURT: Thank you.

MR. GAIL: Okay. Let's spend real time on *Madoff*.

So, first, *Madoff* did not change the world. *Madoff* applied, by its terms, *Northwest Airlines*, and *Northwest Airlines* was applying *Texas Industries*.

Second, *Madoff* recognized expressly that the question of whether contribution is displaced, preempted, precluded is always statute specific.

Third, *Madoff* contemplates on its terms and it says if a right of contribution is implied, it will be recognized. It didn't say that it was implied by SIPA for the reasons we discussed earlier. But on its -- even the language, the categorical what I was calling shorthand that the Court used is internally modified by the notion that contribution can be implied. And this is what we argue here.

Fourth, as I mentioned, the language we are quoting here is shorthand. With all respect, I believe it is shorthand for preemption, but at a minimum it is shorthand and it is arguably *dicta* in a world where *Madoff* concludes that SIPA didn't invoke the circumstances of the New York State statute because there were no damages like your Honor found below and they just phrased it differently above.

And then finally, sixth, I think, and this occurred to me recently, I think we have to step back. Is there any reason why the rule, the supremacy clause, anything would be different with respect to a statute that contemplates contribution as opposed to a statute that contemplates or doesn't contemplate punitive damages or other remedial measures, aiding and abetting, something like that. There is nothing about contribution that suggests there should be a

unique rule about it, it should be read just like all questions of statutory interpretation and construction, and that is what we are suggesting here.

Herman is easy. In the last paragraph of *Herman* they explicitly say it is preempted. It is a preemption case. So that is consistent, not inconsistent.

On the notion of the completeness of the complaint and whether the plaintiff should control their complaint, remember, the complaint references -- the complaints reference -- one of them references Staley 91 times and the other 40 such times. So the question of Staley's role has been interposed by the plaintiff. They control their complaint, but federal rules don't let them control the question of impleader.

On this notion of Congress amended the TVPA but didn't change, include contribution. That's just another measure of silence. And as the Supreme Court explained in *Bob Jones*, silence is really only a useful tool if the question that's being debated is in the public discourse. That's 461 U.S. 599. If contribution and indemnification under the TVPA was not in the discourse——and there is no evidence that it was——then the congressional silence means nothing. If anything, the only opinion that ruled on whether the TVPA permitted contribution was the *Marriott* case, the other case that ruled it not in *dicta*, and that was consistent with finding the right of contribution because the Court there said to conclude

otherwise would give immunity to traffickers and the Court said that's not the right way to read the TVPA.

Finally, at the time of the TVPA's enactment of its civil remedies in 2003, contribution was a common and accepted part of tort law, Restatement of torts, apportionment liability, section 23, and that is against which Congress was legislating.

The --

THE COURT: I agree that congressional silence is normally not much of a basis for reaching a definitive conclusion because, at least in my experience, the representatives in Washington are very talkative, and for them to be silent is quite extraordinary.

MR. GAIL: Not in this case, because no one had contribution --

THE COURT: Right. I'm really saying that as a joke but --

MR. GAIL: I'm with you.

THE COURT: -- that is only because I wanted to exhaust more of your limited time.

MR. GAIL: Let me move then fast, fast, fast, fast.

The argument that we don't allege the injury is silly. We allege basically the injury the plaintiffs allege, and that injury comes from Epstein continuing to bank at JPMorgan. To the extent they are injured, we are injured. We also, as we

allege in our third-party complaint, have reputational costs and so forth.

And then finally on this indemnification question, look at their cases. They are bilateral negotiations. The idea that an indemnification given wholesale and corporate bylaws means the company can never sue for violations for someone who is alleged of, what's the word, sexually assaulting with force is -- as we say, that can't be the law and it's not the law.

Let me just go back to the supplemental jurisdiction question, and I want to push that a little bit because there is a nonzero chance you may feel compelled by the rhetoric of *Madoff* but not the holding of *Madoff*, and therefore you may feel like you can't give us the right of contribution of the TVPA much like we think we have -- they have the right of punitive damages, they have the right of negligence, courts have read that in in the face of silence and so should we be allowed to use state contribution law.

There are two questions:

One is, does the third-party claims, the employment claims, do we get to continue to bring those, if the TVPA claims do not permit contribution but negligence does, state common law and negligence does, where we will have a contribution claim? And we think they don't even contest basically the idea that if our contribution claim for

negligence persists, then we would be allowed to bring the employment claims, the fiduciary duty and faithless servant claims, because the factual overlap is extraordinary. It's essentially what the Court said on severance.

But there is an even more aggressive position, which I will tender for your consideration, which is, in the unlikely event you thought that we didn't have a right to seek contribution under the negligence theories, which I hope and expect the Court will not, but even if you went there, even if there were no contribution, we believe that supplemental jurisdiction would allow you to continue to permit JPMorgan in the same case to pursue the fiduciary duty and faithless servant claims because we are not at the beginning of the case. Discovery has moved on. They have attended something like ten depositions, literally hundreds of thousands of documents have been exchanged, and in those circumstances, judicial economy would be served, the four criteria under supplemental jurisdiction would be served by allowing us to bring those claims in the same case where the plaintiffs. The overlap in witnesses, facts, documents, is extraordinary.

I have a couple minutes, if your Honor would like to ask any questions. Otherwise, I will give the time back to you.

THE COURT: No, I think I have heard from both sides everything I need, and so you can sit down.

First and foremost, I want to express my tremendous appreciation, because this was a terrific argument by two very skilled advocates. One of the joys of being a judge is hearing lawyers of this quality. So I thank you both.

Although this case is, in my view, plodding along at a slow pace, that is not perhaps the only view of it, so I will get you at least a bottom line decision by the end of this month because I have given Mr. Staley time beyond the discovery cutoff for the other parties, but he should know what the story is with respect to this motion before he has to proceed, if at all. So I will -- I don't know that I will get you a full opinion, but I will certainly get you the bottom line by May 31.

I really think that's all on my agenda. Was there anything else either counsel needed to raise or any counsel needed to raise for the Court?

MR. WOHLGEMUTH: Nothing for Mr. Staley.

MR. GAIL: Nothing for JPMorgan.

THE COURT: Thanks again.

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